

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

FILED BY *JK* D.C.  
03 AUG 20 PM 4: 08

ROBERT H. DI TULLIO  
CLERK, U.S. DIST. CT.  
WD OF TN MEMPHIS

UNITED STATES OF AMERICA,

vs.

AUBURN CALLOWAY,

X  
X  
X  
X  
X  
X  
X  
X  
X  
X

Cr. No. 94-20112-(G)B

ORDER CONCERNING MOTION FOR RETURN OF PROPERTY

On December 20, 1995, defendant Auburn Calloway, Bureau of Prisons inmate registration number 14601-076, an inmate at the United States Penitentiary in Atwater, California, through counsel, filed a motion pursuant to Fed. R. Crim. P. 41(e) in his closed criminal case seeking the return of certain unspecified personal property that was allegedly seized "during the investigation and prosecution of the case and incident to his confinement."<sup>1</sup> The Court was recently advised that the motion is still pending.

Calloway's criminal case is closed and criminal proceedings against him in this court are completed. Accordingly, although the motion purports to have been brought pursuant to Fed. R. Crim. P. 41(e), it is untimely. As the motion seeks only the return of property and is civil in nature, however, it is sufficient to invoke the general equity jurisdiction of the Court and the Court construes it as a civil complaint seeking equitable relief.

<sup>1</sup> At the time the motion was filed, the case was on direct appeal.

Ordinarily the Court would issue an order directing the Clerk to remove the motion from the criminal file and docket it as a new civil case. In light of the length of time this motion has been pending, coupled with the apparent absence of any inquiry by this defendant as to its status, it is far from clear that Calloway desires to pursue this matter.

Accordingly, in the event that Calloway intends to pursue this motion, he is ORDERED, within thirty (30) days of the date of entry of this order, to either pay the \$150 civil filing fee or submit a properly certified in forma pauperis affidavit and trust fund account statement showing all activity in his inmate trust fund account for the past six months.<sup>2</sup> The plaintiff is further ORDERED to file, within thirty (30) days of the date of entry of this order, a list itemizing all his personal property he contends was seized by the United States during the investigation and prosecution of the case.<sup>3</sup> Failure to timely file either or both of these documents will

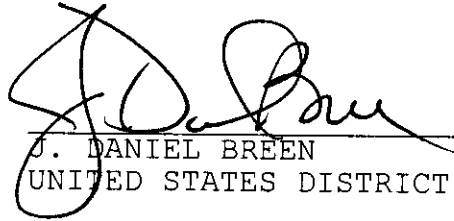
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<sup>2</sup> The defendant is advised that, under the Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C. § 1915(a)-(b), all prisoners bringing a civil action must pay the full filing fee of \$150 required by 28 U.S.C. § 1914(a). The statute merely provides the prisoner the opportunity to make a "downpayment" of a partial filing fee and pay the remainder in installments. See McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997) ("[w]hen an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceeding or over a period of time under an installment plan. Prisoners are no longer entitled to a waiver of fees and costs."). Accordingly, in the event the defendant elects to pursue this matter, he will be required to pay a civil filing fee.

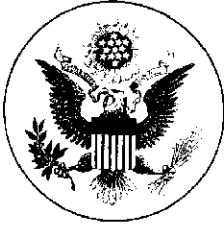
<sup>3</sup> The list submitted by the defendant shall not include any property seized "incident to his confinement," since that is not a proper subject for a motion pursuant to Fed. R. Crim. P. 41(e).

be construed as an indication that the defendant elects not to pursue this matter, and the motion will be denied as moot.

IT IS SO ORDERED this 20<sup>th</sup> day of August, 2003.



J. DANIEL BREEN  
UNITED STATES DISTRICT JUDGE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 227 in case 2:94-CR-20112 was distributed by fax, mail, or direct printing on August 21, 2003 to the parties listed.

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Honorable J. Breen  
US DISTRICT COURT